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THE TRAFFICKING VICTIM PROTECTION ACT: THE BEST HOPE FOR INTERNATIONAL HUMAN RIGHTS LITIGATION IN THE U.S. COURTS?

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Since the 1980s, the Alien Tort Statute[1] (ATS) has been the main vehicle used to bring human rights claims against corporations and individuals in the U.S. courts. Several recent decisions by the United States Supreme Court have radically restricted the scope of the ATS.

After a brief description of the rise of human rights litigation under the ATS and the cases that have restricted its use, this essay explores whether the Trafficking Victim Protection Act (TVPA) can take the place of the ATS as a vehicle for litigating claims of human rights abuses in civil cases or criminal prosecutions in the U.S. federal courts. It concludes that for a narrow but important class of human rights violations— those involving forced labor, sex and forced labor trafficking, and knowingly benefitting from any of these offenses—the TVPA offers a firm footing for both civil and criminal cases.

These offenses are the subject of considerable interest at the present time. The UN's Ruggie Principles[2] require states to "protect

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1. 28 U.S.C. § 1350 (2006). For the original version of the ATS, see Judiciary Act of 1789 § 9(b), 1 Stat. 73.

2. In 2011, the UN Human Rights Council endorsed UN Special Representative John Ruggie's "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework." They read:

> "These Guiding Principles are grounded in recognition of:
>
> (a) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
>
> (b) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises" by "taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication."[3] Both national and international groups are focusing on the need to hold corporations responsible.[4] At the Association Internationale De Droit Pénal's next International Congress, delegates from dozens of countries will consider draft resolutions urging states to revise and develop their legal frameworks to enable the investigation and prosecution of human rights abuses that occur in a company's core business activity, in its supply or distribution chain, and in its other business arrangements that involve multiple legal entities.[5] Additionally, a broad coalition of 85 Swiss organizations is seeking to develop a framework to protect human rights and the environment abroad by setting common benchmarks for all companies based in Switzerland.[6]

(c) The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure."

U.N. HUMAN RIGHTS COUNCIL, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, (last visited June 3, 2017) [https://perma.cc/ULP7-DR8D].

3. *Id.*

4. *See* DAVID VOGEL, THE REVIVAL OF CORPORATE SOCIAL RESPONSIBILITY *in* THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY at 11, (2005) ("…national and international business organizations active in promoting [Corporate Social Responsibility] include the International Business Leaders Forum, the Business Leaders Initiative on Human Rights, the Conference Board, Business in the Community, and San Francisco–based Business for Social Responsibility.").

5. *See* XXth AIDP International Congress of Penal Law, *Prosecuting Companies for Violations of International Human Rights: Jurisdictional Issues, DRAFT RESOLUTIONS*, (June 2-4, 2017), last visited Mar. 31, 2018) http://www.penal.org/sites/default/files/files/XX_AIDP_DRAFT_RESOLUTIONS_circulate.pdf. [https://perma.cc/6E52-VAT8]. The Association holds national groups in more than 30 countries. *See* also AIDP, *List of National Groups*, http://www.penal.org/en/list-national-groups (last visited Feb. 1, 2018) [https://perma.cc/SC87-89C9].

6. SWISS COALITION FOR CORPORATE JUSTICE, http://konzern-initiative.ch/?lang=en (last visited Jan. 31, 2018) [https://perma.cc/P3M9-F48S].

Although the TVPA can make a contribution to efforts to hold corporations responsible for human rights violations, unfortunately many of its key statutory terms are unclear and, in some cases, poorly drafted. The flaws appeared as Congress repeatedly returned to the topic of trafficking in connection with reauthorizing funding for related programs, adding substantive provisions that seem to have received little scrutiny.[7] The courts have interpreted few of these terms, and it is difficult to say how much they will hamper enforcement.

This essay proceeds as follows. Part I briefly discusses the rise in ATS litigation and the Supreme Court's decisions restricting its application, which provide an incentive to search for alternatives and may also reflect judicial attitudes that could affect the interpretation of the TVPA. Part II discusses the enactment and amendment of the TVPA, and provides an overview of the key offenses as well as the civil and criminal remedies. Part III explores issues raised by Congress's failure to define key statutory terms, and what appears to be a significant drafting error. It offers tentative conclusions about the scope of those terms, and thus the reach of the statute. It is too early to say how helpful the TVPA will be in plugging even part of the gap left by the judicial restriction of the ATS.

I. THE RISE AND FALL OF ATS LITIGATION

The ATS has been interpreted to provide the federal courts with jurisdiction over civil actions based on customary international law, but in the past two decades the statute's reach has been substantially narrowed by judicial decisions. The ATS, which was passed as part of the first Judiciary Act of 1789, gives the federal courts original jurisdiction over "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[8]

Beginning with a landmark decision in 1980, lower federal courts held that the ATS provided a private cause of action under international law. In *Filártiga v. Peña-Irala*[9] the Second Circuit held that held the ATS provided federal jurisdiction in a suit brought by Paraguayan nationals against a citizen of Paraguay in United States for wrongfully causing the death of their son by the use of torture.[10] The court ended its opinion with language suggesting the federal

7. Mary Catherine Hendrix, *Enforcing the U.S. Trafficking Victims Protection Act in Emerging Markets: The Challenge of Affecting Change in India and China*, 43 CORNELL INT'L. L. J. 195 (2010).

8. 28 U.S.C. § 1350 (1948).

9. Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980).

10. *Id.* at 878, 887.

courts could play an important role in what it called "the ageless dream" of freedom from gross human rights violations:

> In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him hostis humani generis, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.[11]

Human rights organizations and individual alien plaintiffs soon adopted the strategy of suing corporations (rather than foreign governments) under the ATS.[12] Plaintiffs saw the ATS as offering multiple advantages, including a neutral forum and favorable substantive law, as well as "liberal pretrial discovery; . . . jury trials in civil litigation; higher damage awards, including punitive damages; class action litigation; contingent fee arrangements with counsel; the absence of 'loser pay' rules for the unsuccessful party; and statutory protections for international law violations."[13]

In response to the explosion of ATS litigation, the federal courts have cut back substantially on the statute's effective reach. The Supreme Court imposed two significant limitations. In *Sosa v. Alvarez-Machain* the Court limited the ATS to a narrow range of well-established and specifically defined international law violations.[14]

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11. *Id.* at 890.

12. *See* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation,* 100 GEO. L. J. 709, 718–19 (2012) (describing the shift in litigation strategy and noting dramatic rise in ATS filings following suit against Unocal).

13. *Id.* at 723 (quoting Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 508–09 (2008)).

14. Sosa v. Alvarez-Machain, 542 U.S. 692, 724 (2004). The Court agreed that the ATS provides a basis for jurisdiction but it found "no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* Noting that "there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind," it held that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized." *Id.* at 725.

In *Kiobel v. Royal Dutch Petroleum* the Court held that the presumption against extraterritorial application of statutes bars alien tort claims over conduct that does not "touch and concern the territory of the United States … with sufficient force."[15] The lower courts have generally understood the *Kiobel* ruling to bar all suits based on tortious conduct that occurred solely overseas.[16] However, one lower court allowed an ATS suit alleging torture by U.S. military contractors in Iraq to go forward.[17] The lower federal courts have also applied a variety of other doctrines to limit ATS suits, including prudential or judicially created exhaustion remedies, forum non conveniens, and heightened pleading standards.[18] The decisions have had a dramatic effect: by one count, within the first two years after the decision in *Kiobel*, lower courts dismissed nearly 70 percent of the cases brought under the key statute used by plaintiffs seeking relief for human rights violations.[19]

Additionally, the question remains whether the ATS has any application to corporate defendants. The circuits split on the question of whether corporations were subject to suit under the ATS, with one influential circuit holding that corporate liability has not been established as part of international law.[20] The Supreme Court has granted certiorari to resolve the circuit split.[21]

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15. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013).

16. *See* David Nersessian, *International Human Rights Litigation: A Guide for Judges*, FED. JUD. CTR. INT'L. LITIG. GUIDE, 2016, at 1, 25-8 (collecting cases). In particular, many "foreign-cubed" cases—those brought by foreign plaintiffs against foreign defendants for conduct that occurred on foreign soil—have been dismissed post *Kiobel*. *Id.* at 26-8.

17. *See Foreign Relations Law — Alien Tort Statute — Fourth Circuit Allows Alien Tort Statute Claim Against Abu Ghraib Contractor.* – Al Shimari v. CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014)*, 128 Harv. L. Rev. 1534 (2015) (discussing Al Shimari v. CACI Premier Technology, Inc., 758 F3d 516 (4th Cir. 2014)).

18. Childress, *supra* note 12, at 728-30. The Supreme Court's decisions on general personal jurisdiction have also taken a toll on human rights litigation. *See* Gwynne L. Skinner, *Expanding General Personal Jurisdiction Over Transnational Corporations for Federal Causes of Action*, 121 PENN. ST. L. REV. 617, 634-56 (2017) (collecting cases that reflect the modern development of the ATS).

19. John B. Bellinger III & R. Reeves Anderson, *As* Kiobel *Turns Two: How the Supreme Court is Leaving the Details to Lower Courts*, 2015 U.S. CHAMBER INST. FOR LEGAL REFORM 1, 1, http://www.instituteforlegalreform.com/uploads/sites/1/Kiobel_v6.pdf [perma.cc/A92V-FQCL].

20. *Compare* Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 117, 145 (2d Cir. 2010), *aff'd other grounds*, 569 U.S. 108, 124-25 (2013) (rejecting corporate liability under the ATS) *with* Doe I v. Nestle USA, Inc., 766 F.3d 1013, 1022 (9th Cir. 2014), *reh's denied*, 788 F.3d 946, 946 (9th Cir. 2015) (affirming earlier circuit precedent finding no

The judicial decisions restricting the availability of the ATS reflect concerns about the judiciary's institutional competence and the proper allocation of authority within the federal constitutional system. Influential scholars have argued that the judicial development of international law norms without the clear sanction of and direction from the political branches violates the constitutional principles of federalism and separation of powers.[22] One scholar summed up the current state of affairs:

> [T]here appears to be federal-court recognition that either Congress is unconcerned with activities occurring abroad absent clear statutory language expressing such a concern, or that courts are ill-equipped to adjudicate such cases even though they may have subject-matter and personal jurisdiction. These legal concerns dovetail with other public-policy concerns that courts may be taking [into] account . . . .[23]

These decisions are relevant to the present discussion for two reasons. First, litigants who can no longer rely on the ATS are seeking alterative ground for their claims, and in some cases they have turned to the TVPA.[24] That pressure will intensify if the Supreme Court concludes that the ATS is not applicable to corporations. Second, the judicial attitudes that undergirded the cases construing the ATS may affect the courts' construction of the TVPA.

II. THE TVPA: NEW OPTIONS

The TVPA had its origins in the Victims of Trafficking and Violence Protection Act, which was enacted in 2000.[25] The Act's two primary purposes were "[t]o combat trafficking in persons, especially into the sex trade, slavery, and involuntary servitude, [and] to

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legitimate reason for a complete bar on corporate liability under the ATS).

21. Jesner v. Arab Bank, PLC, No. 16-499, *cert. granted* (April 3, 2017), *argued* (Oct. 10, 2017).

22. *See* Childress, *supra* note 12, at 710, 719-21, 726-27 (describing the scholarly debate).

23. *Id.* at 736.

24. *See* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. 2017) *and* Velez v. Sanchez, 693 F.3d 308, 324-5 (2d. Cir. 2012) (demonstrating how early efforts to rely on the extraterritorial jurisdiction under the TVPA failed because the courts held that the TVPA's grant of extraterritorial jurisdiction did not apply retroactively).

25. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

reauthorize certain Federal programs to prevent violence against women."[26] The provisions of the Act dealing with human trafficking have been widely known as the TVPA.[27] Several features of the original legislation are significant from the perspective of international human rights litigation. Pairing criminal provisions with provisions authorizing funding—which require periodic reauthorization—prompted Congress to return to the topic of human trafficking at regular intervals and expand the reach of the TVPA. Often, the groups lobbying for funding and their supporters in Congress and the executive branch used funding legislation as an occasion to make substantive changes intended to strengthen the TVPA. Second, the trafficking legislation enjoyed bipartisan (and often near-universal) support. Perhaps for that reason, congress enacted the changes intended to strengthen the TVPA with little scrutiny. Unfortunately, the resulting legislation contained some serious flaws.

A. Labor trafficking and the origins of the TVPA

Although Congress's primary concern has been sex trafficking (especially that involving children), from the outset the TVPA offenses also included forced labor and trafficking with respect to forced labor.[28] Widespread media coverage and NGO activity following a 1995 investigation in El Monte, California helped to galvanize support for the TVPA.[29] Seventy-two Thai workers had been forced to live and work making garments in a compound surrounded by a barbed wire fence; some had been held there for as long as seven years.[30] In 2000, an unclassified report on human trafficking written by a State Department analyst under the auspices of the Central Intelligence Agency provided a broader perspective, including a statistical analysis of people being trafficked in the United

26. *Id.*

27. *See, e.g.*, *Remedying the Injustices of Human Trafficking Through Tort Law*, 119 HARV. L. REV. 2574, 2574–5 (2006) [hereinafter *Remedying Injustices*]; Dina Francesca Haynes, *(Not) Found Chained to a Bed in a Brothel: Conceptual, Legal, and Procedural Failures to Fulfill the Promise of the Trafficking Victims Protection Act*, 21 GEO. IMMIGR. L.J. 337, 338 (2007). Some courts and commentators refer to the portions of the TVPA added by later amendments as the TVPRA, but for simplicity this essay will use refer throughout to the TVPA.

28. *See* 18 U.S.C. §§ 1589-90 (2008) (prohibiting forced labor and trafficking with respect to forced labor).

29. Kevin Bales, Laurel Fletcher & Eric Stover, *Hidden Slaves Forced Labor in the United States*, 23 Berkeley J. Int'l L. 47, 57 (2005) [hereinafter *Hidden Slaves*].

30. *Id.*

States.[31] Both events contributed to the TVPA's initial passage.[32] The Victims of Trafficking and Violence Protection Act—including the TVPA—enjoyed near-universal Congressional support.[33]

B. Broadening the TVPA

The linkage of program funding and substantive provisions provided an opportunity for multiple changes in the substantive provisions of the TVPA.[34] Periodic consideration of legislation authorizing the allocation of funds[35] created regular opportunities for public interest groups and law enforcement agencies to advocate for substantive changes to the TVPA.[36] Several of the amendments adopted in the periodic reauthorization process added features better adapting the TVPA as a mechanism to impose liability on corporations for human rights violations.

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31. *Remedying Injustices*, *supra* note 27, at 2574 (citing AMY O'NEILL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 3 (2000), *available at* https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf [perma.cc/CKP6-DGQP]).

32. *Hidden Slaves*, *supra* note 29, at 57.

33. *H.R.3244 - Victims of Trafficking and Violence Protection Act of 2000*, CONGRESS.GOV, https://www.congress.gov/bill/106th-congress/house-bill/3244/all-actions?overview=closed&q=%7B%22roll-call-vote%22%3A%22all%22%7D [perma.cc/7GEG-VY6Y]. The Victims of Trafficking and Violence Protection Act of 2000 was sponsored by Representative Christopher Smith, a Republican from New Jersey, who secured 36 cosponsors, 19 Republicans and 17 Democrats. Less than a year after its introduction, the bill passed the House (371-1) and the Senate (95-0). *Id.*

34. Every version of the TVPA has provided funding only for a limited number of future years. The 2000 Reauthorization provided funding through fiscal year 2002. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) [hereinafter *2003 Reauthorization*] provided funding through fiscal year 2005. The Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558 (2006) [hereinafter 2*005 Reauthorization*] provided funding through fiscal year 2007.

35. *Compare* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §113, 114 Stat. 1464 (2000) (appropriating "the Attorney General $5,000,000 for fiscal year 2001 and $10,000,000 for fiscal year 2002") *with* 2003 Reauthorization, at § 7 (appropriating the Attorney General "$5,000,000 for each of the fiscal years 2004 and 2005").

36. *See* 2003 Reauthorization § 7 (amending the TVPA).

From the perspective of corporate liability, critical amendments in 2003 and 2008 (1) created an offense of benefitting from forced labor,[37] (2) authorized extraterritorial jurisdiction over TVPA offenses,[38] and (3) authorized a civil cause of action for victims[39] as well as mandatory restitution[40] and forfeiture.[41] Like the initial legislation in 2000, these amendments received strong bipartisan support in Congress, [42] and they sailed through Congress with little dispute, or even scrutiny.[43]

C. Relevant offenses

As amended, the TVPA creates six new offenses: (1) forced labor,[44] (2) benefitting financially from forced labor, (3) trafficking with respect to peonage, slavery, involuntary servitude, or forced labor,[45] (4) sex trafficking and benefitting from sex trafficking of children,[46] (5) unlawful conduct with respect to related documents,[47]

37. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5068 (amending 18 U.S.C. § 1589) [hereinafter *Wilberforce Act*].

38. *Id.* at 5071 (enacting 18 U.S.C. § 1596).

39. 2003 Reauthorization, *supra* note 34 at 2878 (enacting 18 U.S.C. § 1595); Wilberforce Act, *supra* note 37 at 5067 (amending 18 U.S.C. § 1589).

40. Wilberforce Act, *supra* note 37 at 5067 (amending 18 U.S.C. § 1593).

41. *Id.* (amending 18 U.S.C. § 1593).

42. Representative Smith sponsored the Trafficking Victims Protection Reauthorization Act of 2003, which passed the House, 422-1, and passed the Senate by unanimous consent. *All Information (Except Text) for H.R.2620 - Trafficking Victims Protection Reauthorization Act of 2003*, CONGRESS.GOV, https://www.congress.gov/bill/108th-congress/house-bill/2620/all-info?r=1 [perma.cc/YY88-KQ3Y] [hereinafter *Information for 2003 Reauthorization*]. Representative Howard Berman, a Democrat from California, sponsored the 2008 Reauthorization. Representative Smith was a cosponsor, along with two other Republicans and three Democrats. The legislation passed the House without objection and Senate with unanimous consent. *All Information (Except Text) for H.R.7311 - William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, CONGRESS.GOV, https://www.congress.gov/bill/110th-congress/house-bill/7311/all-info?r=1 [perma.cc/5KTK-3L6L] [hereinafter *Information for Wilberforce Act*].

43. Information for 2003 Reauthorization, *supra* note 42; Information for Wilberforce Act, *supra* note 42.

44. 18 U.S.C. § 1589 (2008).

45. *Id.*; 18 U.S.C. § 1590 (2008).

46. 18 U.S.C. § 1591 (2008).

47. 18 U.S.C. § 1592 (2008).

and (6) benefitting financially from other TVPA offenses.[48] The new offenses were added to Chapter 77 of Title 18, supplementing Reconstruction-era offenses such as peonage,[49] sale into involuntary servitude,[50] and various offenses concerning slavery.[51]

1. Forced labor and trafficking with respect to forced labor

The forced labor and trafficking offenses cover a wide range of conduct. 18 U.S.C. § 1589(a) defines the forced labor offense to include knowingly providing or obtaining the labor or services of a person by any of the following means (or "any combination" of them):

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint . . . . [52]

Additionally, 18 U.S.C. § 1590 defines trafficking to include "knowingly" recruiting, harboring, transporting, providing, or obtaining "by any means, any person for labor or services in violation of this chapter."[53] This encompasses not only trafficking forced labor as defined by 18 U.S.C. § 1589, but also the peonage, slavery, and servitude offenses in Chapter 77.

2. Benefitting from forced labor and trafficking

From the perspective of potential corporate liability, it is significant that liability for forced labor and trafficking reaches not

48. 18 U.S.C. § 1593A (2008). Although this statute's caption is "Benefitting financially from peonage, slavery, and trafficking in persons," *see infra* notes 99-103 and accompanying text, there is a mismatch between the caption and the conduct covered in the body of the statute.

49. 18 U.S.C. § 1581 (2000).

50. 18 U.S.C. § 1584 (2012).

51. *See* 18 U.S.C. §§ 1585-88 (offenses include seizure, detention, or sale of slaves; service on vessels in slave trade; possession of slaves aboard vessel; and transportation of slaves from United States).

52. 18 U.S.C. § 1589(a)(1)-(4) (2008).

53. 18 U.S.C. § 1590(a) (2008).

only those who commit the offenses defined by the TVPA, but also certain parties who benefit from the offense. 18 U.S.C. § 1589(b), added in 2008, extends liability to anyone who

> . . . knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means . . . .[54]

3. Benefitting from other TVPA violations

18 U.S.C. § 1593A has a similar structure, criminalizing the knowing receipt of a financial benefit or thing of value "from participation in a venture" with knowledge or reckless disregard that the venture has engaged in other TVPA violations.[55] Although the caption indicates this provision extends liability for benefitting from the trafficking of persons,[56] as discussed below it may not reach some of the conduct referred to in the caption.[57]

D. Civil remedies, forfeiture, and restitution

The TVPA also provides a range of remedies for the victims of the offenses defined in Chapter 77, including the Reconstruction-era offenses and those defined by the TVPA. Taken together, these provisions provide victims with an incentive to report violations, cooperate with criminal investigations, and bring civil actions in the absence of criminal prosecution.

The TVPA provides for mandatory restitution of "the full amount of the victim's losses," including "the greater of the gross income or value to the defendant of the victim's services or labor or the value of the victim's labor as guaranteed under the minimum wage and overtime guarantees of the Fair Labor Standards Act (29 U.S.C. 201 et seq.)."[58]

The civil remedy, included in the 2003 reauthorization, provides that any victim of an offense under Chapter 77 may "bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in

54. 18 U.S.C. § 1589(b) (2008).

55. 18 U.S.C. § 1593A (2008).

56. *See id.* ("Benefitting financially from peonage, slavery, and trafficking in persons.").

57. *See infra* notes 100-104 and accompanying text.

58. 18 U.S.C. § 1593(a)(3) (2008).

an act in violation of this chapter)."[59] The civil remedy includes "damages and reasonable attorney's fees."[60] The civil action is subject to the restriction that it "shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim."[61] The statute defines criminal action broadly to include "investigation and prosecution . . . until final adjudication in the trial court."[62]

This provision offers several advantages. First, although the TVPA already provided for victims to receive restitution through criminal proceedings,[63] they may seek a civil remedy when prosecutors do not file charges. Second, it empowers victims to personally confront their victimizers in court.[64] Third, the damages awarded in civil cases may additionally deter human trafficking.[65] However, as noted, any civil action will be stayed if there is an ongoing criminal prosecution, or even just an investigation.

Finally, the TVPA requires mandatory criminal forfeiture of the proceeds of the offense and property used to facilitate the offense, and it directs the Attorney General to transfer forfeited assets and proceeds to satisfy victim restitution under its provisions.[66] Restitution has priority over all other claims.[67]

E. Extraterritorial jurisdiction

The 2008 amendments to the TVPA added language expressly providing for extraterritorial jurisdiction over the new trafficking offenses as well as some of the Reconstruction-era offenses.[68] In addition to domestic or territorial jurisdictional otherwise available, it adds extraterritorial jurisdiction over the enumerated offenses (and attempts and conspiracies to commit them) whenever:

> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or

59. 18 U.S.C. § 1595(a) (2015).

60. *Id.*

61. 18 U.S.C. § 1595(b)(1) (2015).

62. 18 U.S.C. § 1595(b)(2) (2015).

63. 18 U.S.C. § 1593 (2008).

64. *Remedying Injustices*, *supra* note 27, at 2585.

65. *Id.*

66. 18 U.S.C. § 1594(d)-(f) (2015).

67. 18 U.S.C. § 1594(f)(2) (2015).

68. 18 U.S.C. § 1596(a)(2) (2008).

> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.[69]

However, this jurisdiction has an unusual limitation on dual prosecutions. If another foreign government is prosecuting a person "for the conduct constituting the offense," a U.S. prosecution under the TVPA may not be brought without "the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated."[70]

F. Cases that do—and do not—fall within the TVPA

As the foregoing discussion makes clear, the TVPA cannot reach the wide range of cases that were brought under the ATS prior to the Supreme Court's limiting decisions. For example, in *Kiobel*, Nigerian nationals residing in United States sued Dutch, British, and Nigerian corporations pursuant to Alien Tort Statute (ATS). Plaintiffs alleged that corporations aided and abetted the Nigerian government in committing violations of the law of nations in Nigeria, including aiding and abetting atrocities including attacking villages, where they beat, raped, killed, and arrested residents, and destroyed or looted property.[71] The plaintiffs in *Filártiga* were Paraguayan nationals who sought relief from a citizen of Paraguay for wrongfully causing the death of their son by the use of torture. [72] Neither case would fall within the TVPA, which focuses exclusively on offenses related to forced labor, including sex and labor trafficking.

But the TVPA may provide a remedy—and define crimes—for conduct alleged in other cases originally brought under the ATS. For example, in *Doe v. Nestle SA*,[73] a class action, Malian plaintiffs alleged that they were trafficked as young children into the Ivory Coast to harvest and grow cocoa beans.[74] These farms sold the cocoa to the defendants, Nestle, Cargill, and Archer Daniels Midland.[75] The plaintiffs' accounts of their treatment are similar.[76] They worked 12 to

69. 18 U.S.C. § 1596(a) (2008).

70. 18 U.S.C. § 1596(b) (2008) (applying only to situations where the foreign government is acting "in accordance with jurisdiction recognized by the United States….").

71. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 111–113 (2013).

72. Filártiga v. Peña-Irala, 630 F.2d 876, 890 (2d Cir. 1980).

73. Doe v. Nestle SA, 748 F.Supp. 2d 1057 (C.D. Cal. 2010).

74. Second Amended Complaint for Injunctive Relief and Damages at ¶ 1, Doe v. Nestle SA, 748 F.Supp.2d 1057 (C.D. Cal 2010) (No. CV 05-5133-SVM-MRW).

75. *Id.*

76. *See id.* at ¶¶ 57-59.

14 hour days six days a week and were unpaid.[77] They faced corporal punishment for attempted escapes.[78] The class includes everyone forced to labor on the farms in several named regions of Ivory Coast.[79] The complaint further alleges that Ivory Coast's "cocoa hierarchy" benefits from an "Enron-type structure" through which secret bank accounts and front companies insulate beneficiaries.[80] Approximately 70% of the world's cocoa supply comes from the Ivory Coast, and a majority of the U.S.'s cocoa supply comes from these three defendants.[81] All three defendants regularly sent employees from headquarters to inspect operations in the Ivory Coast.[82] The companies entered exclusive buyer-seller relationships with different farms.[83] Through these agreements, the complaint alleges, the companies had the power to set labor standards, which would have prevented the alleged abuse.[84]

The complaint in *Doe v. Nestle SA* shows the potential of the TVPA's civil cause of action to reach certain forms of human rights violations in corporate supply chains. Nestle is a Swiss company.[85] Cargill and Archer Daniels Midland are American.[86] Plaintiffs sued both the parent companies and subsidiaries of Nestle (Nestle S.A., Nestle U.S.A., and Nestle Cote d'Ivoire)[87] and Cargill (Cargill, Inc., Cargill Cocoa, and Cargill West Africa).[88] The allegations might support civil or criminal liability under the TVPA on at least two theories: (1) the defendants knowingly benefitted from participation in a venture including the plaintiffs' forced labor, knowingly or in reckless disregard of the means used, and (2) the defendants aided and abetted the labor trafficking that brought plaintiffs to the farms where plaintiffs were held against their will and forced to work.

77. *Id.*

78. *Id.*

79. *Id.* at ¶ 11.

80. *Id.* at ¶ 31.

81. *Id.* at ¶ 32.

82. *Id.* at ¶¶ 34.

83. *Id.* at ¶ 34-35.

84. *Id* at ¶¶ 35-44.

85. *Id.* at ¶ 18.

86. *Id.* at ¶¶ 21-22.

87. *Id.* at ¶¶ 18-20.

88. *Id.* at ¶¶ 22-24.

III. DRAFTING PROBLEMS AND KEY UNKNOWNS

A. The scope of the forced labor and benefit offenses

Although some case law is developing on the question what constitutes forced labor under subsection (a) of 18 U.S.C. § 1589,[89] two key phrases in subsection (b) have critical importance in cases involving corporate responsibility for forced labor: (1) benefitting financially and (2) participation in a venture. To date, these issues have received virtually no attention from the courts.

1. Benefitting

Section 1589 proscribes "benefit[ting] financially by receiving anything of value."[90] The statute does not define benefitting.[91] In the context of forced labor, the core of the definition seems fairly clear. For example, in the case of the conduct alleged in *Doe v. Nestle SA*, the concept of benefit should include purchasing cocoa for a lower price because forced labor reduced the cost of production. The

89. *See, e.g.*, Muchira v. Al_Rawaf, 850 F.3d 605, 618-19 (4th Cir. 2017) ("Typically, therefore, "forced labor" situations involve circumstances such as squalid or otherwise intolerable living conditions, extreme isolation (from family and the outside world), threats of inflicting harm upon the victim or others (including threats of legal process such as arrest or deportation), and exploitation of the victim's lack of education and familiarity with the English language, all of which are "used to prevent [vulnerable] victims from leaving and to keep them bound to their captors.") (quoting United States v. Callahan, 801 F.3d 606, 619 (6th Cir. 2015) and collecting cases). Many of the cases are fact-bound discussion by district courts ruling on pretrial motion to dismiss. *See, e.g.,* Echon v. Sackett, No. 14-cv-03420-PAB-NYW, 2017 WL 4181417 at *13-16 (finding allegations of forced labor sufficient to deny, in part, motion to dismiss); Stein v. World-Wide Plumbing Supply Inc., 71 F. Supp. 3d 320, 327-29 (E.D. N.Y. 2014) (claiming that plaintiff was forced to work as monitor, not paid, and defendants benefitted sufficient to survive motion to dismiss claim of forced labor under 18 U.S.C. § 1589, but not to state a claim for peonage enticement into slavery).

90. 18 U.S.C. § 1589(a) (2008).

91. Section 1589(b) does require that a defendant knowingly benefit "financially or by receiving anything of value." Although the phrase "anything of value" is not defined, it is similar to the phrase "thing of value," which is used in many federal criminal statutes and generally defined broadly to include both tangible and intangible benefits, including anything of subjective value to the recipient. NORMAN ABRAMS, SARA BEALE, & SUSAN KLEIN., FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 190–92 (6th ed. 2015). The issue was raised in a case involving both forced labor under 18 U.S.C. § 1589 and sex trafficking under 18 U.S.C. § 1591, and the court construed the phrase in accordance with these general principles. Riccio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017). *Accord* United States v. Cook, 782 F.3d 983, 988-89 (8th Cir. 2015) (same in sex trafficking case under § 1591).

question is whether "benefit[]" should be read to be extend substantially further.

Many transactions involve intermediaries, and it may be desirable to interpret the concept of benefit more broadly to reach farther along the supply chain. As an economic matter, Nestle would benefit from forced labor and lower production costs whether it purchased cocoa directly from the farmers who cut costs by using forced labor, or from a middleman who purchased the cocoa from the same farms. It would undercut the goals of the TVPA to allow producers like Nestle to insulate themselves from liability simply by introducing an intermediary, rather than sending their own purchasing agents into the field. Assuming courts accept this line of reasoning, what if there are multiple intermediaries and transactions between the farmers and Nestle? Assuming the other statutory requirements are met, including knowledge or reckless disregard of the use of forced labor, would two, or three, or more intervening transactions break the benefit chain? If the benefit chain extends through multiple transactions, note that the final step in the chain is the consumer. American consumers clearly do benefit financially from the lower prices that result from forced labor in multiple industries. But it seems far-fetched to say that the TVPA should be construed to impose criminal liability on consumers who purchased Nestle chocolate bars if they were aware of media reports demonstrating that the cocoa originated in farms employing forced labor, and hence arguably acting with reckless disregard.[92]

In the alternative, courts could interpret benefit to focus on the producer's ability to gain a competitive advantage in U.S. consumer markets by reducing the cost of ingredients. This theory would have at least two advantages: it would not extend to consumers and it might have jurisdictional significance. Note that if the receipt of the benefit occurs where the sale is made, outside the United States, it would seem to require extraterritorial jurisdiction. In contrast, the competitive advantage, and resulting "benefit," would occur in the United States.

2. Participation in a venture

Section 1589 requires that the benefit be obtained "from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in

92. *But cf.* Rachael Revesz, *Nestle is being sued for allegedly using child slaves on cocoa farms*, INDEPENDENT, July 11, 2016, http://www.independent.co.uk/news/world/americas/nestle-is-being-sued-for-allegedly-using-child-slaves-on-cocoa-farms-a6806646.html [perma.cc/7MYG-R96S] (quoting policy director at campaign group at International Baby Food Action, who stated, "'Every time you eat their chocolate you are benefitting from child slavery.'").

subsection (a)."[93] The lack of any statutory definition of the terms "participation" and "venture" is problematic, because even their core meaning in this context is uncertain.[94]

There is one plausible statutory source of a definition of "venture," but it raises a series of problems. The TVPA sex trafficking provision, 18 U.S.C. § 1591(c)(5), provides a definition of the term, but only for "this section." Section 1591(c)(5) provides that "[t]he term 'venture' means any group of two or more individuals associated in fact, whether or not a legal entity."[95] If Congress had intended this definition to apply throughout the TVPA (or at least to § 1589 as well as § 1591), it would have been easy to say so. Indeed, one could argue that the textual limitation makes it clear that the definition in § 1591(c)(5) was *not* intended to apply to cases under § 1589. But Supreme Court precedent suggests that it would be proper to carry the definition over.[96] In construing RICO's pattern requirement, the Supreme Court considered and rejected a similar argument made by Justice Scalia, consulting a definition contained in another section of the legislation and not referenced in RICO itself.[97]

Assuming that courts consult § 1591(c)(5) when construing § 1589, they will encounter a new set of difficulties. Section 1591(c)(5)'s "associated in fact" language tracks, in part, RICO's definition of the term "enterprise."[98] The courts have struggled to define the term under the RICO statute, generating an extensive body of case law

93. 18 U.S.C. § 1589(b) (2008).

94. *See* Riccio v. McClean, 853 F.3d 553 (1st Cir. 2017) (reversing the dismissal of the case for failure to state a claim, the court emphasized plaintiff's allegations that motel owners, who resided at their motel, knew their long term tenant was physically abusing plaintiff and forcing her to have sex in the motel room, and were associated with tenant's efforts to force the plaintiff to engage in sex for money).

95. 18 U.S.C. § 1591(e)(5) (2008).

96. *See* H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 239-40 (1989) (drawing on definition of "pattern" in another title of the Organized Crime Control Act of 1970, which also included RICO and not included in RICO), *id.* at 251, 252 (Scalia, J., concurring) (noting that when Congress includes particular language in one section of a statute but omits it from another section of the same statute, it is "generally presumed Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

97. *Id.*

98. *See* 18 U.S.C. § 1961(4) (2016) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .").

defining criteria for groups of individuals deemed to be associated in fact for this purpose.[99]

Whether the courts will consider decisions construing RICO as applicable to this language in the TVPA remains unclear. RICO raises distinctive policy concerns that undergird decisions seeking to impose limitations, and these concerns may not apply to TVPA litigation. The first concern reflected in the RICO cases is that the powerful incentives arising from the availability of treble damage and attorneys' fees could swamp the courts with civil cases that bear little or no relation to the concerns that animated Congress in enacting RICO.[100] This concern does not apply to the TVPA, which does not provide for trebled damages. The second concern arises from the courts' search for criteria that meaningfully distinguish RICO violations—with large additional penalties—from garden-variety conspiracies (themselves associations in fact).[101] Again, this concern does not directly apply to the definition of "venture" under the TVPA, because the elements of the TVPA clearly distinguish it from a garden-variety conspiracy. Because of its mens rea terms, the TVPA benefit offense is broader than (and hence statutorily distinct from) a conspiracy to commit forced labor violations.[102] The TVPA benefit offense requires only that the defendant knowingly benefit with at least recklessness with regard to the venture's use of forced labor.[103] In contrast, conspirators must have the specific intent to promote the conspiracy's object (such as the forced labor offenses).[104] Although the

99. *See* Boyle v. United States, 556 U.S. 938, 946 (2009) (concluding that a RICO enterprise composed of a individuals "associated in fact" must have at least three structural features: a purpose, relationships among those associated, and longevity; but rejecting arguments that must have structural features such as hierarchy, role differentiation, and a chain of command), *and* Abrams, *supra* note 91, at 890–96 (reviewing issues arising in construing associated-in-fact enterprises cases following *Boyle*).

100. Abrams, *supra* note 91, at 875 (discussing expressions of judicial concerns about the frequent inclusion of RICO claims in ordinary business disputes and judicial "glosses" intended to make it more difficult to bring RICO claims).

101. *Id.* at 940.

102. 18 U.S.C. § 1589(b) (2008).

103. *Id.*

104. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 432–34 (6th ed. 2012) (noting the question whether this requires purpose, or knowledge of the object offense suffices). Of course a person or entity benefitting from forced labor could also conspire to violate the forced labor statute by entering into an agreement with those committing the labor violations with the requisite specific intent. 18 U.S.C. § 1594(b) makes it an offense to conspire to violate 18 U.S.C. § 1589, and provides that the conspiracy carries the same punishment as the object offense. 18 U.S.C. § 1594(b) (2015); 18 U.S.C. § 1589 (2008).

mens rea requirement distinguishes the TVPA from RICO, the comparison with conspiracy law highlights the potential breadth of the TVPA benefit offenses. Indeed, some courts might consider the TVPA's low mens rea as a factor supporting a narrow construction of the term venture.

The statute also lacks a definition of participation. What does it mean to "participate in a venture"? Courts might construe this term to place an effective limitation on the meaning of benefit in this context. If there are multiple intermediaries between the manufacturers and the farms on which forced labor occurs, does the manufacturer participate in the venture of the farm? Although the text provides no guide, intuitively the answer seems to be that it does not. However, the RICO litigation suggests that the adept drafting of complaints and indictments may cast the same facts in a very different light.[105] Perhaps the venture is not merely the farm, but rather should be understood more broadly as those who run the farm and some of the intermediaries, especially if they are repeat players. This understanding of participation in a venture would eliminate the incentive to create intermediate entities merely to cut off liability, and it would also be broadly consistent with the current practice of creating multinational supply chains over which U.S. producers exert substantial oversight and control. For example, Apple's suppliers employ millions of people worldwide, and Apple itself claims responsibility to "protect the rights of all the people in [its] supply chain. . . ."[106] In upholding this responsibility, Apple has a supplier code of conduct containing standards for "safe working conditions [and] fair treatment of workers . . . ."[107] Apple states publicly that it conducts "regular assessments" to test employer compliance with its code of conduct.[108]

B. Drafting error and omissions in 18 U.S.C. § 1593A

18 U.S.C. § 1593A has even more serious drafting problems. Like the benefit offense in § 1589(b), Congress added § 1593A in 2008.[109] It appears that Congress intended to create a benefit offense broadly applicable to the other sections of the TVPA. Section 1593A's caption refers to "Benefitting financially from peonage, slavery, and trafficking in persons," and it proscribes knowingly benefitting from participation

105. *See* Abrams, *supra* note 91, at 897–901 (describing alternative ways of defining an enterprise based on the same facts).

106. APPLE, Supplier Responsibility, https://www.apple.com/ae/supplier-responsibility/ (last visited Apr. 1, 2018).

107. *Id.*

108. *Id.*

109. Wilberforce Act, *supra* note 37; 18 U.S.C. § 1593A (2008).

in a venture engaging in certain violations, with knowledge or reckless disregard of the venture's violations. It lists three sections: 18 U.S.C. §§ 1581(a), 1592, and 1595. Surprisingly, however, only one of the listed sections conforms to the caption. Section 1581(a) proscribes peonage. But neither section 1592 nor 1595 refers to either slavery or trafficking. To the contrary, 18 U.S.C. § 1592 proscribes only unlawful conduct with respect to certain documents, such as passports, in connection with offenses under Chapter 77. And 18 U.S.C. § 1595 contains no criminal offense; it creates the civil cause of action for victims of TVPA violations. There is no question that this was simply a drafting error.[110]

The drafting error appears to leave a gap in the statutory scheme. Although 18 U.S.C. § 1589(b), 18 U.S.C. § 1593A, and 18 U.S.C. § 1591(a)(2) impose liability for benefitting from forced labor, peonage, and sex trafficking, no comparable provision imposes criminal liability for benefitting from labor trafficking under 18 U.S.C. § 1590(a). Moreover, the gap in criminal liability creates an equivalent gap in civil liability.[111]

Although courts occasionally rely on the doctrine of the scrivener's error as support for construing a statute or rule in conformity with the drafter's clear intent,[112] the courts should not employ that doctrine to close the gap in § 1593A. The precise result intended by Congress is not clear,[113] and in any event new criminal

110. For a discussion on lacking criminal provisions in the Wilberforce Act, *see* CHARLES DOYLE, CONG. RESEARCH SERV., RL40190, THE WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT OF 2008 (P.L. 110-457): CRIMINAL LAW PROVISIONS (2009).

111. Lagasan v. Al-Ghasel, 92 F. Supp. 3d 445, 449, 454-55 (E.D. Va. 2015) (holding a default judgment for a civil claim based on the assumption that § 1593A created an offense of knowingly benefitting from violations of 18 U.S.C. §§ 1584 and 1590, which are not included in the text of § 1593A).

112. *See* United States v. Fort, 472 F.3d 1106 (9th Cir. 2007) (adopting the analysis in United States v. Rudolph, 224 F.R.D. 503, 504-11 (N.D. Ala. 2004) where the court rejected a literal reading of restyled Fed. R. Crim. P. 16(a) because it would go far beyond a stylistic change, altering the scope of the protection afforded to government work product).

113. There are a variety of possibilities as to Congress' intention in drafting § 1593A. While the inclusion of § 1595 is clearly in error, it is less certain that § 1592 was included in error, as it does proscribe misuse of documents related to trafficking and slavery. It is additionally unclear which statute(s) Congress intended to include in lieu of any errors. However, this alone does not necessarily bring the text of § 1593A in line with its caption, since § 1592 does not go to "slavery" in general. It is possible that § 1592 should have been § 1584 (prohibiting involuntary servitude). There is only minimal support for any one interpretation of Congress' intent for § 1593A over another. Doyle, *supra* note 110, at 9

liability should not be recognized in the absence of a properly enacted act of Congress. To do so would create a common law crime.[114]

C. Applicability of the TVPA offenses and civil liability to corporations

Although the defendants in *Doe v. Nestle SA* moved to dismiss on the grounds, inter alia, that the TVPA offenses and civil cause of action do not apply to corporations,[115] that argument seems unlikely to succeed. Federal criminal statutes such as the TVPA are generally applicable to corporations. The Dictionary Act defines commonly used terms throughout the United States Code and by its terms provides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' or 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[116]

Courts have relied on the Dictionary Act's inclusive definition to give meaning to the words "person" or "whoever" in the context of criminal statutes.[117] Although some federal regulatory statutes do specifically include corporations as being subject to the law,[118] the Dictionary Act provides the default rule that a statute need not specifically include terms extending liability to corporations. Section 1589's prohibitions on forced labor and benefitting from forced labor ventures both apply to "[w]hoever" engages in the prohibited conduct."[119] In conformity with the Dictionary Act, these provisions should be held to apply to corporations (and other legal entities) as well as natural persons.

(suggesting that Congress intended to refer to § 1590 (trafficking more generally) when drafting § 1593A).

114. *Cf.* United States v. Hudson, 11 U.S. 32 (1812) (holding that there are no federal common law crimes).

115. Notice of Motion and Motion of Defendants Archer-Daniels-Midland Co.; Nestle, U.S.A.,; and Cargill, Inc. to Dismiss Plaintiffs' Complaint Pursuant to Fed. R. Civ. P. 12(b)(6) for Failure to State a Claim upon which Relief can be Granted: Memorandum of Points and Authorities at 19–22, Doe v. Nestle SA, 748 F.Supp.2d 1057 (C.D. Cal. 2010) (No. CV 05-5133-SVM-MRW).

116. 1 U.S.C. § 1 (2012).

117. *See e.g.,* A&P Trucking Co., 358 US at 123 (addressing corporate violation of Interstate Commerce Commission safety regulations)*; see also* Mohamad v. Palestinian Authority, 566 U.S. 449, 454-55 (2012) (citing the Dictionary Act and contrasting use of term "individual," which refers to natural persons, with the terms persons and whoever, which generally refer to corporations as well as natural persons).

118. *See, e.g.*, 15 USC § 78(c)(a)(1), (9) (2012); 21 U.S.C. § 321(e) (2012).

119. 18 U.S.C. § 1589(a)-(b) (2012).

It seems equally clear that the TVPA provision authorizing civil damages should apply to corporations that have violated the criminal provisions of the act. Looking first to the text, § 1595(a) gives no hint that the cause of action is limited to natural persons. It authorizes the victim to bring a civil cause of action against "the perpetrator" of a violation as well as "whoever knowingly benefits . . . ."[120] If a corporation has violated the forced labor offense it is a "perpetrator," and if it knowingly benefits in violation of § 1589(b) it would fall within the second clause of § 1595(a). Sound policy also supports this result. There is no reason to shield corporate—but not individual—defendants from civil liability based on their criminal conduct. Construing the TVPA to exempt corporations from liability would significantly undermine the goal of making the victims of forced labor crimes whole, since corporate defendants are more likely than individuals to have the funds necessary to pay the victim's damages, plus attorneys' fees.

Although the issue has not arisen in TVPA criminal prosecutions, the TVPA's civil provisions have been used successfully against corporations. In one such case, Filipino teachers sued the recruiting agency that fraudulently induced them to participate by not revealing large fees they would have to pay later, held their visas and passports, and threatened them with deportation when they complained about poor treatment.[121] The district court held that the complaint stated a claim for violations of forced labor and other TVPA offenses,[122] and it certified approximately 250 teachers as a class.[123] In another case, detainees at a for-profit immigration detention center successfully sued the management company under the TVPA for threatening them with solitary confinement in the event they failed to complete particular, unpaid chores.[124] The plaintiffs succeeded, and the case confirmed that the TVPA covers all forced labor, even labor performed by those who are not being trafficked.[125] Neither case explicitly considered whether the TVPA was applicable to artificial entities.

On the other hand, a few courts have ruled that government entities cannot be sued for TVPA violations. In a case brought against the University of Oklahoma, the court ruled that the TVPA

120. 18 U.S.C. § 1595(a) (2015).

121. Nunag-Tanedo v. E. Baton Rouge Sch. Bd., 790 F.Supp.2d 1134, 1145 (C.D. Cal. 2011).

122. *Id.* at 1143-48.

123. Tanedo v. E. Baton Rouge Sch. Bd., No. LA CV10-01172 JAK, 2011 WL 7095434, at *3 (C.D. Cal. Dec. 12, 2011).

124. Menocal v. GEO Group, Inc, 113 F.Supp.3d 1125, 1128 (D. Colo. 2015).

125. *Id.* at 1132–33.

did not abrogate the state's sovereign immunity.[126] A district court took a different tack, relying on the language of the TVPA and the Dictionary Act to conclude that § 1595 does not authorize relief against a government entity, such as a local school board.[127]

D. Extraterritorial jurisdiction

Although Congress expressly provided for extraterritorial jurisdiction over the new TVPA offenses, the statutory language leaves open two important questions: (1) whether (and under what circumstances) corporations are subject to extraterritorial criminal jurisdiction, and (2) whether the TVPA's extraterritorial jurisdiction extends to civil actions. The answer to these questions will help determine whether the TVPA can be employed to close part of the gap left by the Supreme Court's decisions limiting the reach of the ATS.

Unfortunately, the sparse legislative history provides virtually no guidance on these questions. The jurisdictional provision received little attention when the 2008 amendments were enacted. The House Report regarding the 2008 Reauthorization included "facilitating extraterritorial prosecutions against international trafficking criminals" in its list of "[k]ey provisions relating to combatting trafficking in the United States,"[128] but it provides no further information on the scope of the jurisdictional provisions.[129] Congress seems to have modeled § 1596(a) on the jurisdictional provisions governing genocide prosecutions,[130] but no court has considered the question of its applicability to corporations under either statute. Thus, this analysis will focus on the text, in light of the Supreme Court's recent decisions construing another similar term and considering the extraterritorial application of other laws.[131]

126. Mojsilovic v. Okla. *ex rel.* Bd. of Regents for Univ. of Okla., 841 F.3d 1129, 1131-33 (10th Cir. 2016).

127. Nunag-Tanedo v. E. Baton Rouge Sch. *Bd.*, No. SACV 10-1172-AG (MLGx), 2011 WL 13153190 at *10-12 (C.D. Cal. May 12, 2011).

128. H.R. Rep. No. 110-430, pt. 1, at 35 (2007).

129. The only other reference to extraterritorial jurisdiction in the report comes in the section by section analysis, which states that section 22 of the bill "provides jurisdiction for U.S. courts for prosecution of certain slavery and trafficking offenses committed abroad." *Id.* at 55.

130. *Compare* 18 U.S.C. § 1596(a) (2012) (stating the genocide jurisdictional provisions were enacted the year before the TVPA provisions, and the language is virtually identical), *with* 18 U.S.C. § 1091(e)(2) (2012) (showing that genocide provisions do include some bases of jurisdiction that are not present in the TVPA—offenses "committed in whole or part in the United States," and offenses allegedly committed by "a stateless person whose habitual residence is in the United States.").

131. *See* Mohamad v. Palestinian Auth., 566 U.S. 449 (2012).

1. Applicability to corporations and other entities

The grant of extraterritorial jurisdiction enacted in 2008 extends to TVPA offenses (including forced labor and benefitting from forced labor) if:

> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
>
> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.[132]

Under subdivision (1), the critical term is "national." If a corporation is incorporated in the United States, or has its principal place of business here, is it a "national of the United States" under subsection (1)? Or are nationals—like permanent resident aliens—necessarily individuals? Judged by the standards recently applied by the Supreme Court, it appears that a corporation is a United States national if it is incorporated in the United States, and perhaps also if it has its principal place of business here.[133]

In *Mohamad v. Palestinian Authority*[134] the Court considered the question whether the statutory term "individual" includes corporations under the Torture Victims Protection Act of 1991,[135] and its decision provides guidance for analysis of the term "national" in the TVPA. The Court turned first to multiple dictionaries to determine the ordinary meaning of the term; it concluded that, when used as a noun, "'individual' ordinarily means '[a] human being, a person.'"[136]

In contrast, according to similar sources, the ordinary meaning of the term "national" is not limited to human beings. For example, one leading dictionary defines "national" as "a citizen or subject of a particular nation who is entitled to its protection."[137] This seems broad enough to encompass domestic corporations because they are statutorily deemed to be U.S. citizens for some purposes, and they are entitled to claim the protection of the United States and its laws. The federal statutes governing diversity jurisdiction and removal

132. 18 U.S.C. § 1596(a).

133. *Mohamad*, 566 U.S. 449.

134. *Id.*

135. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 and accompanying note (2012)).

136. *Mohamad*, 566 U.S. at 454 (quoting 7 OXFORD ENGLISH DICTIONARY 880 (2d ed. 1989).

137. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1279 (2001).

provide that a corporation is "deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business."[138] U.S. trade law also entitles domestic corporations to protection against unfair competition by companies from other countries.[139] The Oxford English Dictionary, which the Court relied on in *Mohamad*, provides another definition of a "national" as "[a] representative of a nation."[140] Some corporations, particularly state-owned or government-linked companies, are clearly representatives of their nations,[141] but other companies are closely associated with and understood in a general sense to represent their country of incorporation.[142] Thus, the ordinary meaning of "national" seems to include both natural persons and corporations.

In defining the term "individual" in *Mohamad*, the Supreme Court also looked to the treatment of the term in other federal statutes, finding that they "routinely distinguish between an 'individual' and an organizational entity of some kind."[143] In contrast, the pattern of statutory usage of the term "national" seems less clear. A few other statutes distinguish "national[s] of the United States" from corporations for purposes of extraterritorial jurisdiction. The statutes

138. 28 U.S.C. § 1332(c)(1) (2012).

139. For example, Boeing brought an anti-dumping case seeking high tariffs on Canada's Bombardier C series passenger jets. In October 2017, the U.S. commerce department issued a preliminary decision stating that it would impose an 80 per cent tariff on top of duties of 220 per cent ordered in an earlier anti-subsidy decision that prompted a sharp reaction from Canada and the UK. *US orders new tariffs on Bombardier jets*, FINANCIAL TIMES, Oct. 17, 2017. Although that decision was reversed by the United States International Trade Commission, a quasi-judicial body, it was part of a series of "trade skirmishes" that created an "uneasy atmosphere between the longstanding allies" and became "an international kerfuffle." Ana Swanson, *Boeing Denied Bid for Tariffs on Canadian* Jets, N.Y. TIMES, Jan. 26, 2018.

140. 10 OXFORD ENGLISH DICTIONARY 234 (2d ed. 1989).

141. For example, the Canadian Broadcasting Company, which has no shareholders, is a public company managed by a board of directors appointed by Canada's Governor in Council (who serves as the Queen's representative). *See* Broadcasting Act, S.C. 1991, c 11, § 36(2) (Can.).

142. Like airlines and airline manufacturers, a nation's large automakers are often closely associated with its national identity and national interests, giving rise to claims that what is good for GM—or another large U.S. company—is good for the United States. For a discussion of the origins of that phrase (which is frequently misquoted), see Robert W. Patterson, *Whatever happened to the "America" in "corporate America"?* NATIONAL REVIEW (July 1, 2013), https://www.nationalreview.com/2013/07/whats-good-america-robert-w-patterson/ [https://perma.cc/8B3T-ZN68].

143. Mohamad v. Palestinian Auth., 566 U.S. 449, 455 (2012).

providing for extraterritorial jurisdiction over acts of nuclear terrorism and violence against maritime transport involving weapons of mass destruction provide for jurisdiction when the offense is committed by a "national of the United States" or "a United States corporation or legal entity."[144] On the other hand, statutes do not use this terminology consistently. For example, a statute governing loan guarantees deems a corporation a "citizen or national of the United States,"[145] and a provision on customs duties defines the term "United States citizen" to include "any individual who is a citizen or national of the United States" and "any corporation, partnership, association, or other legal entity organized or existing under the laws of the United States or any State."[146]

Subdivision (2) provides an alternative ground for extraterritorial jurisdiction when the accused is "present in the United States." It seems relatively clear that companies are "present" in this sense when they are incorporated in the United States or have their principal place of business here. (Indeed, the Supreme Court has stated that, for purposes of civil litigation, a corporation's place of incorporation and a corporation's principal place of business are the "paradigm" places where a corporation can be "fairly regarded" as at home; they are "unique ... as well as easily ascertainable[,] ... afford[ing] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.")[147]

But in the case of a foreign corporation, what would suffice to establish presence in the United States for this purpose? The sparse legislative history provides a clue. In hearings on the 2008 amendments, Senator Durbin raised the issue of extraterritorial TVPA jurisdiction, suggesting that U.S. law should provide for jurisdiction over an individual trafficker who later retired to the United States (and presumably was "present" here).[148] Assuming, *arguendo,* that such fleeting physical presence justifies extraterritorial TVPA jurisdiction over individuals who are citizens of other nations, should the same be true of corporations who do business in the United States, even if those transactions are unrelated to the alleged TVPA

144. 18 U.S.C. § 2332i(b)(2)(a) (2015) (nuclear terrorism that takes place outside the United States); 18 U.S.C. § 2280a(b)(1)(A)(iii) (2015) (violence against maritime navigation and maritime transport involving weapons of mass destruction that takes place outside the United States).

145. 15 U.S.C. § 2509(i).

146. 19 U.S.C. § 2601(11)(A), (B).

147. Daimler AG v. Bauman, 134 S. Ct. 751, 760 (2014).

148. *See Legal Options to Stop Human Trafficking: Hearing on H.R. 7311 Before the Senate Subcomm. On Human Rights and the Law of the Senate Judiciary Comm.*, 110th Cong. 1 (2007) (statement of Sen. Richard J. Durbin).

violations? If so, this would make extraterritorial jurisdiction under the TVPA roughly parallel to general civil jurisdiction, rather than specific jurisdiction. In the civil context, however, the Supreme Court has interpreted the Due Process clause to significantly restrict general jurisdiction over foreign corporations doing business in the United States.[149] The Court rejected the argument that general jurisdiction obtains in any state in which a corporation "engages in a substantial, continuous, and systematic course of business."[150] A U.S. court may only assert general jurisdiction over out-of-state corporations where "their affiliations with the [forum] State are so 'continuous and systematic' as to render them essentially at home" in that state.[151] The Court also cited the need to avoid international discord.[152] Although this was a civil case, the courts might deem some of the same constitutional and policy considerations relevant to construing the scope of extraterritorial criminal jurisdiction under the TVPA.

2. Civil liability

On its face, the provision granting extraterritorial jurisdiction simply grants jurisdiction over the "offenses,"[153] making no reference to civil liability. However, the language conferring civil jurisdiction is quite broad: it provides that a victim of an offense under Chapter 77 "may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees."[154]

Plaintiffs will likely argue that Congress intended the reach of the civil and criminal remedies to coincide, but in recent decisions the Supreme Court has emphasized that courts construing federal statutes should apply a strong presumption against extraterritorial effect.[155] These cases instructed the federal courts to apply a presumption

149. Daimler AG, 134 S. Ct. at 763 (2014).

150. *Id.* at 760-61.

151. *Id.* at 751 (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).

152. Id. at 762 (discussing the lower court's failure to consider international comity).

153. 18 U.S.C. § 1596(a) (2008).

154. 18 U.S.C. § 1595(a) (2015).

155. Many earlier cases had also recognized this presumption, but its application had been uneven and courts more frequently found that legislation applied extraterritorially. *See* RESTATEMENT (FOURTH) FOREIGN RELATIONS LAW OF THE U.S. § 203 ch. 1 note 1 (AM. LAW INST., Tentative Draft No. 3, 2017).

against extraterritoriality: absent a clearly expressed Congressional intent to the contrary, federal laws will be construed to have only domestic application.[156] In justifying this presumption, the Court emphasized the need to avoid international discord[157] or friction, as well as the "common sense" view that Congress ordinarily focuses on domestic matters.[158] Although 18 U.S.C. § 1596(a) does contain an explicit grant of jurisdiction over criminal violations, the Supreme Court's decision in *RJR Nabisco, Inc., v. European Community*[159] suggests that the courts would nonetheless deem the presumption against extraterritoriality applicable to the construction of 18 U.S.C. § 1595(a), which provides for a civil remedy. In *RJR* the Court confronted the question of whether RICO authorized jurisdiction over civil claims for injuries suffered outside the United States.[160] Despite the fact that many predicate RICO offenses provide for extraterritorial jurisdiction,[161] the Court concluded that presumption against extraterritoriality was applicable to the civil cause of action for damages arising from RICO violations, which was accordingly limited to domestic injuries.[162] By the same logic, the grant of extraterritorial jurisdiction over the criminal offenses in 18 U.S.C. § 1596(a) has no effect on the reach of the civil action in § 1595(a), which would be subject to the strong presumption against extraterritorial effect.

It should be noted, however, that several courts have assumed that there will be extraterritorial civil jurisdiction over TVPA violations that occur after the enactment of 18 U.S.C. § 1596(a). In cases arising from conduct before the enactment in § 1596(a), these courts have dismissed the plaintiffs' claims on the ground that §

156. *See* Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 117-18 (2013) (claims by Nigerian nationals for events that occurred in Nigeria were barred because nothing in the Alien Tort Statute rebutted the presumption against extraterritoriality); *see also* Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 261 (2010) (Securities Exchange Act of 1934 did not affirmatively rebut the presumption against extraterritoriality therefore did not apply extraterritorially).

157. *See Kiobel*, 569 U.S. at 116-17 ("[T]he danger of unwarranted judicial interference in the conduct of foreign policy is magnified in the context of the [Alien Tort Statute]").

158. *See Morrison,* 561 U.S. at 255 ("[The presumption against extraterritoriality] rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters.").

159. RJR Nabisco, Inc., v. European Cmty. 136 S. Ct. 2090 (2016).

160. *Id.* at 2096.

161. *See id.* at 2101-2 (citing a number of RICO violations that explicitly provide for extraterritorial jurisdiction).

162. *Id.* 2106.

1596(a) does not apply retroactively.[163] That point, of course, would be moot if § 1596(a) had no effect in civil cases. Indeed, even a court that recognized the applicability of *RJR Nabisco's* analysis to civil causes of action under § 1596 nonetheless suggested that the 2008 amendments might be given effect in civil cases.[164]

Assuming that the courts conclude that there is no extraterritorial jurisdiction over actions under § 1595(a), that leaves open the question whether some plaintiffs may be able to show that the "focus" of the TVPA and violations that "touch and concern the territory of the United States … with sufficient force"[165] to warrant domestic

163. *See, e.g.,* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. 2017); Velez v. Sanchez, 693 F.3d 308, 324 (2d. Cir. 2012); Plaintiff A v. Schair, No. 2:11-cv-00145-WCO, 2014 WL 12495639, at *3-4 (N.D. Ga. Sept. 9, 2014).

164. Adhikari V. KBR, Inc., No. 4:16-CV-2478, 2017 WL 4237923, at *13-14 (S.D. Tex. Sept. 25, 2017). The court stated:

> RJR Nabisco's general rule is clear: a civil remedy that lacks clear indications of extraterritorial reach will redress only injuries experienced domestically, no matter the substantive provisions' scope. Section 1595 lacks those clear indications. Thus, on question of whether KBR's alleged domestic violations of Section 1590 caused remediable domestic injuries or irremediable foreign injuries, the Court must conclude the latter. Plaintiffs' injuries, whatever their cause, were suffered only in foreign countries. They are, therefore, beyond the reach of the TVPRA that existed at that time.
>
> The Court's regret in reaching this holding is tempered by its recognition that Congress later extended the remedies for forced labor and trafficking to apply extraterritorially. That amendment of the law might be taken as an indication of the scope that Congress always intended those prohibitions to have. One can imagine canons of construction that avoided the need for Congress so to act, resolving statutory ambiguity in ways that further Congress's purposes and erring on the side of justice. But, as the Supreme Court's recent rulings instruct, those are not our canons. And so Plaintiffs' TVPRA claims must be dismissed.

165. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124-25 (2013); *see* Skinner, supra note 18, at 656 (suggesting that courts may find no extraterritorial civil jurisdiction under the TVPA because of its decisions restricting general personal jurisdiction over foreign corporations). For TVPA cases applying these tests, see Samuel v. Signal Int'l LLC, No. 1:13 CV-323, 2015 WL 112765986, at *3-4 (E.D. Tex, Jan. 26, 2015) (focus of TVPA on where forced labor occurred; transporting and recruiting workers into the United States is a domestic not extraterritorial application of 18 U.S.C. §§ 1589 & 1590); Tanedo v. East Baton Rouge Parish School Board, No. SA CV10-01172 JAK (MLGx), 2012 WL 5378742, at *6-7 (C.D. Cal. Aug. 27, 2012) (concluding that 18 U.S.C. § 1590 was not being applied extraterritorially when defendants trafficked plaintiffs into the United States to work here, though some initial contacts occurred in the Philippines), *See also* Adhikari V. KBR, Inc., No. 4:16-CV-2478, 2017

jurisdiction. As noted above,[166] a producer who gains sales and market share in the United States may be "benefitting financially" in the United States as a result of forced labor overseas.

IV. CONCLUSION

It is too soon to say whether the TVPA can play an important role in holding corporations accountable for human rights violation in their supply chains. Virtually every key term remains to be defined, and the scope of the jurisdictional provisions is equally uncertain. It is worth noting that in construing the TVPA the federal courts are likely to be affected by the same concerns that motivated them to limit the ATS's reach, namely that their capacity to adjudicate cases arising from conduct occurring abroad.[167] On the other hand, the enactment and subsequent amendments broadening the TVPA show that Congress has been concerned with activities occurring abroad. The strongest case for extraterritorial civil litigation would likely involve child sex trafficking, rather than labor trafficking, with individual claimants seeking to recover damages from individuals and corporate entities that knowingly benefitted from the sex trafficking. Such a case would bring into play not only judicial and public concern condemnation of such abuse of children, but also highlight Congress's strong concern with protecting and compensating victims of this abuse.

Why has so little precedent construed the TVAP, since nearly 10 years has passed since the adoption of the civil cause of action and the authorization of extraterritorial criminal jurisdiction? A guide for federal judges describes some of the challenges both courts and atttorneys face in extraterritorial cases alleging human rights violations:

> Human rights cases often involve the broader challenges inherent in any type of transnational litigation, in which documents, physical evidence, and witnesses often are located outside of the jurisdictional reach of the court. The parties' need to access evidence abroad may require that the court draw upon various mechanisms for taking testimony and procuring

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WL 4237923, at *5 (S.D. Tex. Sept. 25, 2017) (concluding that although 18 U.S.C. 1589's prohibition on forced labor focuses on the place where the forced labor occurred, 18 U.S.C. § 1590's broader focus could encompass conduct of actors in United States who instigated a transnational human trafficking scheme but never brought workers to the United States).

166. *See supra* notes 82-84 and accompanying text (discussing alternative construction).

167. *See supra* note 19 and accompanying text (discussing judicial concerns).

> documents overseas. Evidence obtained may be in one or more foreign languages, necessitating the use of translation services in pretrial and trial proceedings. There also are the challenges inherent in adjudicating any piece of complex litigation, such as large numbers of parties, large-scale discovery, class action certification, and heightened media interest in the case.[168]

This account dovetails with concerns about the courts' capacity to adjudicate cases arising from activities occurring abroad, and it highlights the enormous difficulties advocates face in attempting to pursue civil cases for victims. The government would also face enormous hurdles in pursuing such cases. In contrast, it can far more easily prosecute TVPA cases involving foreign domestic servants treated as virtual slaves in the United States,[169] or women trafficked and sexually abused or forced to work as prostitutes in the United States.[170]

The TVPA stands in marked contrast with the Foreign Corrupt Practices Act, where enforcement has ramped up dramatically since 1997.[171] At least when domestic and international relations considerations are favorable, U.S. prosecutors can navigate the problems of transnational litigation.[172] When will the time be right for aggressive enforcement of the TVPA provisions on forced labor and benefitting from forced labor overseas?

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168. Nersessian, *supra* note 16, at 2.

169. *See, e.g.,* United States v. Sabhanani, 599 F.3d 215 (2d Cir. 2010 (affirming conviction for forced labor, harboring aliens, peonage, and domestic servitude for gross mistreatment of domestic servants); United States v. Calilmlim, 538 F.3d 706 (affirming forced labor conviction for gross mistreatment of housekeeper). For a case in which the court found that the government had taken 18 U.S.C. § 1589 too far, see. United States v. Toviave, 761 F.3d 623 (6th Cir. 2014) (reversing forced labor conviction based on requiring child relatives living with defendant to perform household chores and imposing harsh discipline).

170. *See., e.g.,* United States v. Rivera*,* 2013 WL 2339381 at *16 (E.D.N.Y. June 19, 2012) (denying Rule 29 motion to set aside jury verdict finding defendant guilty of forced labor of victims forced to work at bars where they were sexually abused).

171. Rachel Brewster, *Enforcing the FCPA: International Resonance and Domestic Strategy*, 103 U. VA. L. REV. 1611, 1647-56 (2017).

172. *See id.* at 1655-78 (Brewster argues persuasively that the increased FCPA enforcement occurred only after the United States successfully concluded an international treaty that established anti-bribery as a binding legal principle, legitimized U.S. prosecutions of foreign corporations, and leveled the playing field for U.S. corporations).